A

OM CAHAYA MINERAL ASIA BHD v. DAMANSARA REALTY (PAHANG) SDN BHD

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
VERNON ONG LAM KIAT JCA
B HASNAH MOHAMMED HASHIM JCA
[CIVIL APPEAL NO: W-02(IM)(NCVC)-1226-07-2016]
20 DECEMBER 2017

C ***CIVIL PROCEDURE:*** *Striking out – Appeal against – Illegality of contract – Allegation of – Whether contract between parties tainted with illegality – Failure to obtain requisite licences to operate at site – Triable issues – Whether arose – Whether facts and issues required further investigation at trial – Whether appellant's claim plain and obviously unsustainable – Rules of Court 2012, O. 18 r. 19*

D The relationship between the appellant and the respondent was culminated by an agreement, a letter of award and a variation letter (collectively referred to as 'the contract'). The contract created a two-fold obligation on the part of the appellant. The first part of the obligation of the appellant under the contract was to do site clearance, to undertake and perform cut and fill works over the land owned by the respondent ('the land') and to undertake all E preparation to ensure that the land was duly levelled. The second part of the obligation of the appellant under the agreement was to pay a lump sum fee of RM30.8 million, as tribute payment for the right granted by the respondent to extract and dispose of the minerals found on site. The appellant claimed that it had completed site clearance and the cut and fill works on the F land as well as other related works pursuant to the agreement. The respondent, however, terminated the agreement without citing any reason. Despite various appeals by the appellant, the respondent refused to let the appellant remain on site in order to continue performing its obligations under the agreement. The appellant filed a suit against the respondent seeking a G declaration that the termination was unlawful. Following that, the appellant claimed damages and loss of profit. The respondent applied to strike out the appellant's suit under O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of Court 2012 ('ROC 2012') based on the issue that the appellant never had any requisite licenses to operate at the respondent's site and the contract between the parties was in contravention of both the Federal and the State law related H to mining. The High Court found that the contract between the parties was tainted with illegality as the appellant would not be able to perform and honour its undertaking under the contract for want of the requisite licenses. The claim of the appellant was thus struck out by the High Court. Hence, the appellant appealed.

I

Held (allowing appeal)
Per Rohana Yusuf JCA delivering the judgment of the court:

(1) The applicable mining license herein was the proprietary mining license issued under s. 81 of the Pahang Mineral Enactment 2001 ('the Enactment') since the land involved was alienated land belonging to the respondent. Under s. 81(1) of the said Enactment, any application for such a licence must be made by the owner of the alienated land to the State Authority. It would therefore be wrong for the respondent to expect the appellant to have obtained licences over its land. (para 13)

(2) Licences such as the prospecting license and exploration license which may be obtained pursuant to s. 41 of the Enactment are needed before any prospecting or exploration work. Under s. 89 of the Enactment, a written permission from the landowner is required to be submitted to the Director of Lands and Mines prior to doing any exploration and prospecting work. It was the appellant's pleaded case that the respondent had refused or neglected to give written permission for that purpose to the appellant. This dispute could not be resolved purely by affidavits and would necessitate investigation in a trial. Further, whether or not the job scope of the appellant stipulated under the contract required licence or otherwise, needed further examination. (paras 15 & 17)

(3) Even if the contract was found illegal, there was a possibility that the appellant may be compensated under s. 66 of the Contracts Act 1950. This section applies to an agreement which is void *ab initio*. The crucial test was whether the parties were aware of the illegality and this certainly required further investigation at trial. There were various factual situations which called for the application of s. 66, hence, findings of facts on some of the issues were necessary to determine the scope of application of this section. (para 19)

(4) The appellant's claim was not plainly and obviously unsustainable to be struck out under O. 18 r. 19 of the ROC 2012. Thus, the order of the trial judge ought to be set aside and consequently, the case was to be remitted to the High Court. (para 25)

Bahasa Malaysia *Headnotes*

Hubungan antara perayu dan responden menjurus pada satu perjanjian, satu surat award dan satu surat variasi (secara kolektif dirujuk sebagai 'kontrak'). Kontrak mewujudkan kewajipan dua bahagian pada pihak perayu. Bahagian pertama kewajipan perayu bawah kontrak adalah untuk melakukan pemugaran tapak, untuk menjalankan kerja-kerja memotong dan menimbus atas tanah yang dimiliki responden ('tanah tersebut') dan untuk melakukan segala persediaan bagi memastikan tanah tersebut diratakan. Bahagian kedua kewajipan perayu bawah perjanjian adalah untuk membayar bayaran sekali gus RM30.8 juta, sebagai pembayaran ufti bagi hak yang diberikan oleh responden untuk mengekstrak dan membuang mineral-mineral yang dijumpai

di tapak. Perayu mendakwa bahawa ia telah menyelesaikan pemugaran di tapak serta kerja-kerja menimbus di atas tanah dan segala kerja-kerja berhubungan dengan perjanjian itu. Responden, walau bagaimanapun, membatalkan perjanjian tanpa memberikan apa-apa alasan. Walaupun terdapat pelbagai rayuan oleh perayu, responden enggan membenarkan perayu kekal di tapak untuk melakukan kewajipannya bawah perjanjian. Perayu memfailkan tindakan guaman terhadap responden dan menuntut pengisytiharan bahawa pembatalan tersebut menyalahi undang-undang. Berikutan itu, perayu menuntut ganti rugi dan kerugian keuntungan. Responden memohon untuk membatalkan guaman perayu bawah A. 18 k. 19(1)(a), (b), (c) dan (d) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') berdasarkan isu bahawa perayu tidak mempunyai apa-apa lesen yang diperlukan untuk beroperasi di tapak responden dan kontrak antara pihak-pihak bertentangan dengan kedua-dua undang-undang Negeri dan Persekutuan berhubungan perlombongan. Mahkamah Tinggi mendapati bahawa kontrak antara pihak-pihak tercemar oleh kepenyalahan undang-undang kerana perayu tidak mungkin dapat menjalankan dan memenuhi kontrak kerana tidak mempunyai lesen-lesen yang diperlukan. Tuntutan perayu dengan itu dibatalkan oleh Mahkamah Tinggi. Oleh itu, perayu merayu.

Diputuskan (membenarkan rayuan)
Oleh Rohana Yusuf HMR menyampaikan penghakiman mahkamah:

(1) Lesen perlombongan yang diguna pakai di sini adalah lesen melombong proprietari yang dikeluarkan bawah s. 81 Enakmen Mineral Pahang 2001 ('Enakmen') kerana tanah yang terlibat adalah tanah diberi milik kepunyaan responden. Bawah s. 81(1) Enakmen tersebut, apa-apa permohonan untuk lesen sebegitu harus dibuat oleh pemilik tanah yang diberi milik kepada Pihak Berkuasa Negeri. Oleh itu, adalah salah untuk responden mengharapkan perayu memperoleh lesen-lesen ke atas tanah itu.

(2) Lesen-lesen seperti lesen mencari gali dan lesen penjelajahan yang boleh diperoleh menurut s. 41 Enakmen diperlukan sebelum apa-apa pekerjaan mencari gali atau penjelajahan. Di bawah s. 89 Enakmen, kebenaran bertulis daripada pemilik tanah diperlukan untuk diserahkan kepada Pengarah Tanah dan Galian sebelum apa-apa penjelajahan atau kerja cari gali dilaksanakan. Adalah kes yang diplidkan perayu bahawa responden enggan atau gagal memberikan kebenaran bertulis untuk tujuan itu kepada perayu. Pertikaian ini tidak boleh diselesaikan hanya melalui afidavit dan akan memerlukan siasatan dalam perbicaraan. Tambahan, sama ada skop pekerjaan perayu yang ditetapkan bawah kontrak disyaratkan lesen atau sebaliknya, memerlukan pemeriksaan selanjutnya.

(3) Sekali pun kontrak didapati menyalahi undang-undang, terdapat kemungkinan bahawa perayu boleh diberikan pampasan bawah s. 66 Akta Kontrak 1950. Seksyen ini dipakai pada satu persetujuan yang void *ab initio*. Ujian penting adalah sama ada pihak-pihak sedar bahawa ia menyalahi undang-undang dan ini memerlukan siasatan lanjut dalam perbicaraan. Terdapat beberapa situasi fakta yang mewajarkan kegunaan s. 66, oleh itu, dapatan fakta berkenaan beberapa isu diperlukan bagi menentukan skop permohonan seksyen ini.

(4) Tuntutan pemohon jelas bukan tuntutan yang tidak boleh diterima untuk dibatalkan bawah A. 18 k. 19 KKM 2012. Oleh itu, perintah mahkamah bicara harus diketepikan dan akibatnya, kes akan diremitkan ke Mahkamah Tinggi.

Case(s) referred to:

Bandar Builder Sdn Bhd v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd [2011] 1 CLJ 285 CA ***(refd)***

Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark [1899] 1 QB 86 ***(refd)***

Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd [1999] 2 CLJ 997 FC ***(refd)***

Shahidan Shafie v. Atlan Holdings Bhd And Anor & Other Appeals [2005] 3 CLJ 793 CA ***(refd)***

Sivarasa Rasiah & Ors v. Che Hamzah Che Ismail & Ors [2012] 1 CLJ 75 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 66

Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d), O. 33 r. 2

Mineral Enactment 2001, ss. 2, 12(1), 21, 28, 35, 41, 81(1), 89

The Indian Contracts Act 1872 [Ind], s. 66

For the appellant - Bastian Vendargon, Edwin Lim & Masturina Mohamad Rodzi; M/s Edwin Lim & Suren

For the respondent - Jagjit Singh, Akberdin Abdul Kader & Harjinder Singh Sandhu; M/s Akberdin & Co

[Editor's note: For the High Court judgment, please see OM Cahaya Mineral Asia Berhad v. Damansara Realty (Pahang) Sdn Bhd [2016] 1 LNS 826 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Rohana Yusuf JCA:

[1] The claim of the appellant was struck out by the High Court at Kuala Lumpur, on the application by the respondent pursuant to O. 18 r. 19 of the Rules of Court 2012. The striking out order was made on the basis that the contractual relation between the parties was tainted with illegality, and hence no right of claim under such a contract would be sustainable. Against this

order, the appellant's appeal was heard before us. We, however, agreed with the appellant that its claim is not plain and obviously unsustainable. We, therefore, allowed the appeal of the appellant and set aside the order of the learned judge. Consequently, we remitted the case to be set for trial at the Kuala Lumpur High Court.

[2] The appellant is in the business which includes the preparation of site for construction, cut and fill works, site clearance and also mineral extraction as well as mineral export. The respondent is the registered owner of a parcel of land known as Lots 1, 2, 3, 4, 9, 12 and 18 located at Mukim Sungai Karang, Daerah Kuantan, Pahang Darul Makmur measuring approximately 500 acres ("the land").

[3] The relationship between the appellant and the respondent is culminated by the agreement dated 1 December 2014 ("the agreement"), letter of award dated 5 February 2015 and the variation letter dated 2 March 2015 (collectively referred to as "the contract").

[4] The contract creates a two-fold obligation on the part of the appellant. As spelled out in cl. 2 of the agreement, the scope of work of the appellant are as set out below, where OCMAB refers to the appellant and DRP refers to the respondent:

> APPOINTMENT AND DURATION
>
> DRP hereby appoints OCMAB as the contractor to undertake the works as mentioned under the scope of works on portion of the land for a duration of minimum sixteen (16) months from the commencement date with an option of a further term of one (1) year from the expiry of the initial term subject to further grants the right for OCMAB to appoint any other contractors (if any) at their own cost, and also OCMAB are to apply for any licences from relevant authorities for purposes to undertake the work as defined under the scope of work at their own cost and expenses. For all intend and purposes, DRP shall liaise only with OCMAB directly for the works and shall not be dealing with any third party contractors appointed by OCMAB, and DRP in no way whatsoever, are to be held liable to any third party contractors appointed by OCMAB (if any) for whatsoever reasons as their respective appointments are with OCMAB alone.

[5] The first part of the obligation as spelled out in the above clause is to be read with para. 3 of the letter of award dated 5 February 2015 which sets out the following terms:

> DESCRIPTION OF JOB SCOPE
>
> Description of the works to be done is including, but not limited to the following:
>
> (a) To perform site clearance and preparation of the said land for future development purposes together with any other requirements at OCMAB's own cost and expenses;

(b) To ensure that the land is duly level and suitable for future development to the satisfactory of DRP; and

(c) To undertake and perform cut and fill works according to the need and requirement of DRP, subject to the approval of relevant authorities (if any).

There is also a covenant on the part of the appellant to pay the respondent a lump sum fee of Ringgit Malaysia Thirty Million Eight Hundred Thousand (RM30,800,000) for granting the appellant the right to extract and dispose of any mineral found in the land. This amount shall be utilised to off-set cost incurred for the works stated above agreed to be in the sum of RM10.8 million. The balance of Ringgit Malaysia Twenty Million (RM20,000,000) shall be paid in accordance with the schedule tabulated in the agreement.

[6] From the plain reading of the above clauses, it appears that the first part of the obligation of the appellant under the contract is to do site clearance, to undertake and perform cut and fill works over the land and to undertake all preparation to ensure that the land is duly levelled. For this part of the obligation, the respondent agreed to pay a total sum of RM10.8 million. It was agreed that this RM10.8 million will be set off against tribute payment payable by the appellant under the second part of the obligation. The second part of the obligation of the appellant under the agreement is to pay a lump sum fee of RM30.8 million, as tribute payment for the right granted by the respondent to extract and dispose of the minerals found on site.

[7] The appellant claimed it had completed site clearance and the cut and fill works on the land. For that purpose, the appellant had engaged contractors and machineries, obtained the necessary approvals, engaged specialist and geologist to conduct site survey and studies, execute laboratory research to determine the quality of minerals found on site, arranged for a proper washing machinery to wash the bauxite extracted from the land, arranged for a proper weighing bridge at site to weigh the extracted and washed bauxite, arranged for transportation to transport bauxite, engaged financial consultant and other related works pursuant to the agreement.

[8] The respondent however, terminated the agreement without citing any reason. Despite various appeals made by the appellant, the respondent refused to let the appellant to remain on site in order to continue to perform its obligations under the agreement. Instead, the appellant was instructed to demobilise all its machineries and equipment from the site within seven days.

[9] The appellant filed a suit against the respondent seeking for declaration that the termination was unlawful. Following that, it claims damages of RM15,833,484.16, loss of profit in the sum of USD85 million (RM366,656,000). Alternatively, it seeks for a declaration that the appellant

is entitled to specific relief; an extension of 526 days with an option to extend the contract for a further one year; loss and damages to be assessed; interests and costs.

[10] The respondent applied to strike out the appellant's suit under O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of Court 2012. The basis of the striking out application was premised on the issue that the appellant never had the requisite licenses to operate at the respondent's site and the contract between the parties is in contravention of both the Federal and the State law related to mining. In other words, the respondent claimed that the contract is illegal as it contravenes the law relating to mining.

[11] The learned High Court Judge agreed with the respondent and found the contract between the parties tainted with illegality as the appellant would not be able to perform and honour its undertaking under the contract for want of the requisite licences. It was not disputed that the appellant did not possess any licence under the Pahang Mineral Enactment No 7 of 2001, nor under the Mineral Development Act 1994 at the commencement of the contract between them. This was despite the warranty and the covenant in cl. 3a of the agreement by the appellant. Under cl. 3a, the appellant (referred to as OCMAB) warrants and covenants:

> That OCMAB have all the necessary licenses for purposes of undertaking the above scope of work and OCMAB shall procure any other licenses and approval as required by the relevant authority at OCMAB's costs and expenses.

[12] The learned judge had construed this clause to mean that at the commencement of the contract itself, the appellant must be in possession of the requisite licenses to enable it to undertake the scope of work under it. And if there is any need for other licences or approvals, then those licences or approvals will have to be procured and the appellant is obliged to apply for them at its own cost. According to the learned judge, since the appellant did not possess the requisite licence at the commencement of the contract itself, the appellant was in no position to undertake its obligations as covenanted under the contract. In carrying out the works on the land as claimed by the appellant, the learned judge found the appellant had in fact exposed the respondent to criminal offences under the Pahang Mineral Enactment. Since the contract of the parties is tainted with illegality, it disentitled the appellant to any right of claim under it. The claim of the appellant was therefore struck out by the learned judge.

[13] It was the submission of the learned appellant's counsel before us that under the Pahang Mineral Enactment 2001, there are two types of mining licenses that will be issued. The first type is the individual mining license under s. 35, which is granted over State land declared to be an individual mining area. The second type is the proprietary mining license issued under s. 81. This licence is granted to the owner or proprietor of alienated land.

On the facts of the present case, the applicable mining license would be the second category and not the first, since the land involved is alienated land belonging to the respondent. And under s. 81(1) of the same Enactment, any application for such a licence must be made by the owner of the alienated land to the State Authority. It would therefore be wrong for the respondent to expect the appellant to have obtained licences over its land, in the first place.

[14] The other type of licenses are the fossicking license under s. 21 and dulang license under s. 28 which are applicable to natural persons and hence not relevant for our consideration.

[15] Then there is also the prospecting license and exploration license which may be obtained pursuant to s. 41. These licenses must be obtained before any prospecting or exploration work. However, under s. 89, a written permission from the landowner is required to be submitted to the Director of Lands and Mines prior to doing any exploration and prospecting work. It is the appellant's pleaded case that the respondent had refused or neglected to give written permission for that purpose to the appellant. This dispute, in our view, cannot be resolved purely by affidavits and would necessitate investigation in a trial.

[16] It was also the submission of the respondent that the appellant could not have done any work on the land without the requisite license or the mineral tenement as stated in s. 12(1) of the Pahang Enactment. Mineral tenement is defined under s. 2 of the Enactment as follows:

> "Mineral tenement" means a fossicking licence, dulang licence, individual mining licence, prospecting licence, exploration licence, proprietary mining licence, mining licence, mining lease, or any of them for the purpose of exploration or mining of minerals or ores, as the case may be, issued under Federal or State Law regulating mineral tenements.

[17] As we have alluded to earlier, the scope of works under the agreement are two-fold. The first part involves the clearing of the lands, cut and fill works to ensure the land is level and suitable to be used for the purpose intended. We do not find it clear firstly, if the nature of work involved as stated under the contract, in fact requires license under the Mineral Enactment or any other relevant laws. And if so who is obliged to apply or obtain those licences. The appellant maintained that the job scope under the first part of the contract requires no license. In our view, whether or not the job scope of the appellant stipulated under the contract especially those covered within the scope in the first part of the two-fold obligation requires licence or otherwise needs further examination.

[18] The appellant claimed to have carried out some of the works in the first part and receives no payment for the same. Also as pleaded by the appellant a payment of RM2 million has been paid as part of tribute money under the agreement. The agreed term of payment is for the first part of the

work to be set off against the tribute money payable by the appellant for the purposes of mining in the land. It is not clear how the payment of the tribute is made and not set off against the work done for the first part of the agreement as agreed. Having maintained its case that no license would be necessary to carry out that part of the agreement, the appellant further contended that even if the contract is void for want of licenses which the appellant was alleged to have failed to obtain, at least the work done by the appellant may attract s. 66 of the Contracts Act 1950.

[19] We agreed with learned counsel for the appellant however, even if the contract is found illegal, there is a possibility that the appellant may be compensated under s. 66 of the Contracts Act. This section applies to an agreement which is void *ab initio*. It was applied by the Privy Council in interpreting s. 65 of the Indian Contracts Act which is *pari materia* to our s. 66. The crucial test being whether the parties were aware of the illegality and this certainly requires further investigation at trial. There are various factual situations which call for the application of s. 66, hence in our view, findings of facts on some of the issues are necessary to determine the scope of application of this section.

[20] In *Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd* [1999] 2 CLJ 997; [1999] 3 MLJ 81, the Federal Court had discussed and explained the scope of s. 66, as a restitutionary provision where any remedy granted under the section is not based strictly on contract. It is based on an exception to a generally accepted principle that the court will not enforce nor grant remedy under an illegal contract. The exception being that an innocent party may obtain certain remedies and not the guilty party. To determine its application therefore the court will have to determine whether or not the party was aware of the illegality. At least on this ground the need for a trial is plainly obvious.

[21] It is not disputed that the pleaded case of the appellant does not seek for remedy under s. 66 of the Contracts Act. However, in this regard, we agreed with the appellant's counsel that the court should not strike out a claim summarily if it can be saved by amendment to the pleadings (see *Shahidan Shafie v. Atlan Holdings Bhd & Anor And Other Appeals* [2005] 3 CLJ 793.)

[22] We find it appropriate at this juncture to examine the decision of this court in *Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd* [2011] 1 CLJ 285; [2011] 2 MLJ 192 which had provided us with useful guidance in dealing with issues on illegality under a contract. The court in that case was faced with the question of whether or not the issue of illegality which involved a timber transaction between parties was so plain and obvious as to be struck out under O. 18 r. 19(1)(a), (b), (c) or (d). Having examined the list of authorities involving the issue on illegality, the court held that the enforcement of the rights of the plaintiff in that case would involve issue of

law and fact which require mature consideration *via viva voce* evidence. The court further observed that it would be both unsafe and unsound to conclude that the plaintiff's claim is an abuse of the process of the court, especially where an issue of illegality has to be decided.

[23] In *Sivarasa Rasiah & Ors v. Che Hamzah Che Ismail & Ors* [2012] 1 CLJ 75; [2012] 1 MLJ 473 this court had adopted a well-settled principle that a striking order should not be made where there is issue of law requiring lengthy argument and especially if it requires issue of facts for its resolution. Likewise in the instant appeal, there are factual issues such as whether some part of the work for land clearance for example are works requiring licenses under the Mineral Enactment, the Mineral Development Act 1994, and the National Land Code. Also, the issue on whose responsibility the application for the necessary licenses befall under the law and finally the effect of the provision for restitution under s. 66 of the Contracts Act 1950.

[24] The Supreme Court in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36, had also observed that amongst the requisite test applicable for striking out is that, if there is a point of law which requires serious discussions, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 2 referring to an English decision in *Hubbuck & Sons Ltd v. Wilkinson*, *Heywood & Clark* [1899] 1 QB 86.

[25] For all these reasons, we do not find the claim of the appellant plain and obviously unsustainable to be struck out under O. 18 r. 19. We allowed the appeal by the appellant and set aside the order of the learned trial judge. Consequently, we remitted the case to the High Court at Kuala Lumpur for trial.